Datuk Lim Kheng Kim v Malayan Banking Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–51 OF 1992
GUNN CHIT TUAN CJ (MALAYA), PEH SWEE CHIN AND MOHAMED DZAIDDIN SCJJ
4 JUNE 1993

Bankruptcy *— Notice — Setting aside — Affidavit to set aside bankruptcy notice did not disclose counterclaim, set-off or cross demand — No sufficient cause shown why receiving and adjudication orders should not be made — Bankruptcy Act 1967 s 3*

Bankruptcy *— Notice — Setting aside — Appellant did not file notice of motion supported by affidavit — Whether affidavit in opposition was bad in law — Bankruptcy Rules 1969 r 18*

On 27 April 1989 the respondent issued a bankruptcy notice against the appellant requiring him to pay the sum of RM2,603,913.28 being the amount due on a final judgment including interest, professional charges and costs. The notice was served on the appellant on 2 May 1989. On 6 May 1989, he filed an affidavit (encl 3) purportedly to be an affidavit to set aside the bankruptcy notice under r 95 of the Bankruptcy Rules 1969 ('the Rules'). On 20 October 1989, the respondent filed the creditor's petition against the appellant, which was served on him on 29 November 1989 and one month thereafter, on 29 December 1989, the appellant filed another affidavit, described as an 'affidavit in opposition' (encl 15). This was a lengthy affidavit which contained several grounds, including the two grounds which he had deposed in encl 3. After hearing the creditor's petition and the submissions of counsel on 27 January 1992, the learned judicial commissioner was satisfied that the appellant had not shown sufficient cause as to why the receiving and adjudication orders should not be made. Accordingly, he made the orders in terms. [See [1992] 2 MLJ 540.] The appellant appealed.

Held, dismissing the appeal:

(1) The affidavit in encl 3 merely denied and disputed that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but failed to disclose that he had a counterclaim, set-off or cross demand, etc against the respondent, which he is required to depose under s 3(1)(i) of the Bankruptcy Act 1967 ('the Act') and provided for in Form 7. The affidavit cannot therefore operate as an application to set aside the bankruptcy notice within the contemplation of s 3(1)(i) of the Act, and the case should have been treated as if no affidavit under r 95 had in fact been filed. Similarly, as para 3 of the enclosure merely disputed the indebtedness of the appellant to the respondent 'based on an erroneous calculation and grossly exaggerated' without condescending to particulars of the amount actually due, the

affidavit does not attract proviso 2(ii) of s 3 of the Act which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the actual amount due.

(2) Failure on the part of the appellant to follow r 18 of the Rules rendered his 'affidavit in opposition' (encl 15) ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately, the appellant has failed to do so in this case.

Per curiam:

It is clear that by r 95(1) of the Rules 1969, the filing of the affidavit as in encl 3 operates as an application to set aside the bankruptcy notice, and the registrar is required to fix a day for the hearing of the application, and by sub-r (2), if the application cannot be heard before the time specified in the bankruptcy notice, the registrar shall extend the time. Rule 95(2) is merely directory which compels the registrar to extend the time until the application opposing the bankruptcy notice is heard and determined.

[Bahasa Malaysia summary

Pada 27 April 1989 penentang telah mengeluarkan suatu notis kebankrapan terhadap perayu meminta beliau membayar sebanyak RM2,602,913.28 iaitu jumlah yang harus dibayar atas suatu penghakiman muktamad termasuk bunga, bayaran profesional dan kos. Notis itu telah disampaikan kepada perayu pada 2 Mei 1989. Pada 6 Mei 1989, perayu telah memfailkan suatu afidavit (lampiran 3) yang dimaksudkan sebagai suatu afidavit untuk mengetepikan notis kebankrapan itu di bawah k 95 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah itu'). Pada 20 Oktober 1989, penentang telah memfailkan suatu petisyen pemiutang terhadap perayu, yang telah disampaikan kepadanya pada 29 November 1989 dan sebulan kemudian, pada 29 Disember 1989, perayu telah memfailkan satu lagi affidavit, yang disebut sebagai 'afidavit membangkang' (lampiran 15). Afidavit ini panjang dan mengandungi beberapa alasan, termasuk dua alasan yang telah disebutkan di dalam lampiran 3. Selepas mendengar petisyen pemiutang dan hujah-hujah peguambela pada 27 Januari 1992, pesuruhjaya kehakiman yang arif telah berpuashati bahawa perayu tidak menunjukkan sebab-sebab yang mencukupi mengapa perintah penerimaan dan penghukuman tidak perlu dibuat. Dengan itu beliau telah membuat perintah seperti yang dikehendaki. [Lihat [1992] 2 MLJ 540.] Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Affidavit di lampiran 3 hanya menafi dan mempertikaikan bahawa perayu terhutang kepada penentang sebanyak RM2,603,913.12,

tetapi tidak menzahirkan sama ada beliau mempunyai tuntutan balas, tolakan atau kenabayar balas atau sebagainya terhadap penentang, yang perlu dizahirkan menurut s 3(1)(i) Akta Kebankrapan 1967 ('Akta itu') dan seperti yang diperuntukkan di dalam Borang 7. Oleh itu, afidavit itu tidak boleh beroperasi sebagai suatu permohonan untuk mengetepikan notis kebankrapan yang dimaksudkan di dalam s 3(1) Akta itu, dan kes itu sepatutnya dianggap seperti afidavit tidak difailkan di bawah k 95. Begitu juga, oleh kerana perenggan 3 lampiran itu hanya mempertikaikan keterhutangan perayu kepada penentang 'berasaskan kepada perkiraan yang tidak betul dan terlampau dilebih-lebihkan' tanpa memberi butir-butir mengenai jumlah yang benar-benar terhutang, afidavit itu tidak termasuk di bawah syarat 2(ii) s 3 Akta itu yang mengatakan bahawa suatu notis kebankrapan tidak boleh dijadikan tidak sah hanya kerana jumlah yang disebutkan di dalam notis itu sebagai jumlah terhutang melampaui jumlah yang sebenarnya terhutang.

(2) Kegagalan perayu untuk mematuhi k 8 Kaedah itu menjadikan affidavit membangkangnya (lamp 15) tidak berkesan dan tidak sah dari segi undang-undang oleh kerana, kecuali jika mahkamah mengarahkan sebaliknya, bantahan terhadap petisyen pemiutang atau notis kebankrapan, selain dari keadaan di mana beliau mempunyai tuntutan balas, tolakan atau kenabayar balas yang sama dengan atau yang melebihi hutang penghakiman itu, hendaklah dibuat dengan memfailkan suatu notis usul yang disokong oleh afidavit. Sayangnya perayu tidak membuat demikian di dalam kes ini.

Per curiam:

Jelas dari k 95(1) Kaedah itu bahawa memfailkan afidavit seperti di lampiran 3 berkesan sebagai suatu permohonan untuk megenepikan notis kebankrapan itu, dan pendaftar dikehendaki menetapkan hari untuk pendengaran permohonan itu dan menurut sub-k (2) jika permohonan itu tidak didengar sebelum tempoh yang ditetapkan di dalam notis kebankrapan, pendaftar hendaklah melanjutkan masa itu. Kaedah 95(2) Kaedah itu walaubagaimanapun hanya merupakan arahan sahaja yang mensyaratkan supaya pendaftar melanjutkan masa itu hingga permohonan menentang notis kebankrapan itu didengar dan diputuskan.]

Notes

For cases on the setting aside of a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed) paras 1075–1076.

Cases referred to

1 *In re A Debtor, ex p Debtor (No 523 Of 1934)* [1935] 1 Ch 347 (folld)

2 *Re Natarajan a/l Kuppusamy, ex p Co-operative Central Bank Ltd (in receivership)* [1992] 2 MLJ 468 (folld)

A 3 *Soh Bok Yew v Cindee Developments Sdn Bhd* [1977] 1 MLJ 242 (refd)
4 *Re A Debtor (No 10 of 1953)* [1953] 1 WLR 1050; [1954] 3 All ER 74 (refd)

Legislation referred to
B Bankruptcy Act 1967 s 3
Bankruptcy Rules 1969 rr 18 & 95

Appeal from: Bankruptcy No 29–513–89 (High Court, Penang)

C *Ooi Teck Hoe* and *Choo Hon Choy* (*Ooi Lee & Co*) for the appellant.
Toh Lee Hong and *Tho Su-Fen* (*Lim Huck Aik & Co*) for the respondent.

Mohamed Dzaiddin SCJ (delivering the grounds of decision of the court): This was an appeal from the decision of Abdul Hamid JC (as he then was) granting the receiving and adjudication orders against the appellant on 27
D January 1992. We dismissed the appeal and now give our reasons for the decision.

The facts of the case had been clearly set out in the judgment of the learned judicial commissioner reported in [1992] 2 MLJ 540. However, for the purpose of the appeal, we would like to state briefly the salient facts.

On 27 April 1989, Malayan Banking Bhd ('the respondent') issued a
E bankruptcy notice against the appellant requiring him to pay the sum of RM2,603,913.28, being the amount due on a final judgment including interests, professional charges and costs. The notice was served on the appellant on 2 May 1989. On 6 May 1989, he filed an affidavit (encl 3) purportedly to be an affidavit to set aside the bankruptcy notice under r 95
F of the Bankruptcy Rules 1969 ('the Rules'). About five and a half months later, ie on 20 October 1989, the respondent filed the creditor's petition against the appellant, which was served on him on 29 November 1989 and one month thereafter, on 29 December 1989, the appellant filed another affidavit, described as an 'affidavit in opposition' (encl 15). This was a lengthy affidavit which contained several grounds, including the two grounds
G which he had deposed in the earlier affidavit (encl 3).

After hearing the creditor's petition and the submissions of counsel on 27 January 1992, the learned judicial commissioner was satisfied that the appellant had not shown sufficient cause why the receiving and adjudication orders should not be made. Accordingly, he made the orders in terms.

H Before us, Encik Ooi Teik Hoe, counsel for the appellant, raised several grounds of appeal contending that the learned judicial commissioner was wrong in law on his decision. In dismissing the appeal, we hasten to state that we have no reason to disagree with the decision of the learned judicial commissioner. However, we would like to elaborate on the effect of the two affidavits (encls 3 and 15) vis-a-vis the bankruptcy petition.

I In dealing with the two affidavits in encls 3 and 15, the learned judicial commissioner made the following observations:

> Enclosure 3 is an affidavit in which the judgment debtor disputed that he was indebted to the judgment creditor in the sum of RM2,603,913.28 stated in the

bankruptcy notice. Enclosure 3 itself gives no particulars. But particulars are given in the 'affidavit in opposition' — encl 15 (at p 549).

Enclosure 15 is an 'affidavit in opposition' and filed one month after the creditor's petition was served on the judgment debtor. By right it should be a notice to show cause pursuant to r 117. But it also contains attacks on the bankruptcy notice, including grounds raised in encl 3, besides new grounds. It also contains grounds as to why the creditor's petition should be dismissed (at p 551).

Enclosure 3

This affidavit was filed on 6 May 1989 which reads as follows:

(1) I am the judgment debtor above-named and the facts deposed to hereto are within my personal knowledge in all unless the contrary is shown.
(2) I have read and caused to be explained to me the bankruptcy notice dated 27 April 1989.
(3) I deny and further dispute that I am indebted to the judgment creditors in the sum of RM2,603,913.28 as stated therein. In this respect, I state that the figure was based on an erroneous calculation and grossly exaggerated.
(4) In the premises, I am accordingly advised by my solicitors and verily believe that the bankruptcy notice is bad ab initio and I am therefore not obliged to comply with same. My solicitors will submit on points of law at the hearing.

We would observe here that the above affidavit, purportedly an affidavit to set aside the bankruptcy notice, fails to follow, both in form and substance, Form No 7 of the Rules, which contains the requirements of s 3(1)(i) pertaining to a debtor to 'satisfy the court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained ...'.

Rule 95 of the Rules states as follows:

Application to set aside.

(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.
(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

It seems clear to us that by r 95(1), the filing of the affidavit as in encl 3 operates as an application to set aside the bankruptcy notice, and the registrar is required to fix a day for the hearing of the application, and by sub-r (2), if the application cannot be heard before the time specified in the bankruptcy notice for compliance with its requirement, the registrar shall extend the time.

In re A Debtor, ex p Debtor,[1] Lord Hanworth MR, delivering the judgment of the court, dealt with r 141 of the Bankruptcy Rules 1915 (which is in para materia with our r 95) and stated at p 349:

> The filing of an affidavit for the purpose of an application to set aside a bankruptcy notice, if the affidavit is one which complies with r 140 of the Bankruptcy Rules 1915, is to be treated as notice of an application to set aside the notice, and then the procedure under r 141 follows. That rule is mandatory and clear. It says this: 'The filing of such affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for the hearing of the application, and not less than three days before the day so fixed shall give notice thereof, both to the debtor and the creditor, and their respective solicitors, if known. If the application cannot be heard until after the expiration of the time specified in the notice as the day on which the act of bankruptcy will be complete, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.'

It is noted here that r 140 dealt with the affidavit which must contain 'a counterclaim, set-off or cross demand' and one which the deponent could not have set up in the action in which the judgment or order was obtained. Slesser LJ, in his judgment (at p 352) emphasized:

> It is, therefore, necessary that the affidavit in question should, on the face of it, show a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which the debtor could not have set up in the action in which the judgment or order was obtained.

We are concerned here with the content of the said affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross demand, etc against the respondent, which he is required to depose under s 3(1)(i) of the Bankruptcy Act ('the Act') and provided for in Form 7. Following the above decision and in the face of the above affidavit, we are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s 3(1)(i) of the Act, and the case should have been treated as if no affidavit under r 95 had in fact been filed. Similarly, as para 3 of the enclosure merely disputes his indebtedness in the said sum to the respondent 'based on an erroneous calculation and grossly exaggerated' without condescending to particulars of the amount actually due, we say that the said affidavit does not attract proviso 2(ii) of s 3 which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the actual amount due.

Further, under sub-r (2) of r 95, if the application cannot be heard before the time specified in the notice for compliance with the requirements of the bankruptcy notice, the registrar shall extend the time for the hearing. Thus, what happened in this case was that when the hearing of encl 3 was fixed on 30 August 1989, the judge hearing the bankruptcy petitions on that day overlooked this application but proceeded to dispose of encl 6, which was a notice of motion for an order that further proceedings be stayed until the payment of costs by the respondent to the appellant in respect of an earlier proceeding. From the record, no fresh date of hearing in respect of encl 3 was given by the court, and nor was there any evidence that the registrar had granted an extension of time for the hearing of the

application. Encik Ooi submitted that failure of the registrar to extend the time did not invalidate the appellant's application in encl 3. Counsel relied on the judgment of VC George J in *Re Natarajan a/l Kuppusamy, ex p Co-operative Central Bank Ltd (in receivership)*,[2] who held that in the face of the language in r 95(2), the time for the compliance with the bankruptcy notice was to be deemed to have been extended by the registrar until the application had been disposed. The learned judge followed the judgment of the Federal Court in *Soh Bok Yew v Cindee Developments Sdn Bhd*,[3] where, in its judgment, it referred to a judgment of Harman J in *Re A Debtor (No 10 of 1953)*[4] at p 1054 which states: 'The rule is directory and compels the registrar to extend it until the application has been heard and determined.'

One of the points argued in *Soh Bok Yew*[3] was whether the various adjournments made by the judge had complied with the requirements under r 95(2) that the registrar should extend the time for compliance under the notice. The Federal Court, relying on Harman J's dictum, held that 'the fact that the various adjournments on record were made in open court by the learned trial judge does not make any difference because the registrar has no choice and may be deemed to have made corresponding extensions of time for compliance with the notice.' (at p 243).

The learned judge further stated that based on his own enquiries from the current practice in our courts, the registrars generally did not expressly extend the time which they were required to do by r 95(2).

For reasons stated by George J, with which we agree, we say that r 95(2) is merely directory which compels the registrar to extend the time until the application opposing the bankruptcy notice is heard and determined.

Enclosure 15

This is the appellant's affidavit affirmed on 29 December 1989, which he called an 'affidavit in opposition'. It contains 19 paragraphs attacking the bankruptcy notice and raising several grounds why the creditor's petition should be dismissed.

Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The format of the notice of intention to oppose the petition is given in Form 16 of the Rules, which simply provides that:

> I, the above ... do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt (or the act of bankruptcy, or as the case may be).

Looking at the appellant's 'affidavit in opposition', it appears that he had jumbled up every conceivable grounds of opposition he could think of in this affidavit, which not only includes grounds raised in encl 3, but also submissions of law and pleas for the court to exercise its discretion judicially and in the interest of justice. Bearing in mind that this 'affidavit in opposition' was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counter-claim

or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r 18, which reads:

> Applications to be made by motion.
>
> Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.

In our opinion, failure on the part of the appellant to follow r 18 renders his 'affidavit in opposition' ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately, he has failed to do so in this case.

In passing, we wish to emphasize that, contrary to what had been expressed in *Soh Bok Yew*,[3] if a bankruptcy petition is to be founded on an act of bankruptcy based on a failure to comply with a bankruptcy notice, it is self-evident that such a petition can only be filed after the application to set aside the bankruptcy notice is heard and dismissed.

For the above reasons, we dismissed the appeal with costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim